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LAMBERT'S POINT CO. *v.* NORFOLK & W. RY. CO.

March 14, 1912. On Motion to Modify Decree, March 27, 1912.

[74 S. E. 156.]

1. Navigable Waters (§ 39*)—Littoral Rights—Rivers—Boundary Between Adjoining Owners.—In determining the division line between the lands in a river between the shore line and the port warden's line, or line of navigability, to which adjoining owners of shore lands are entitled, the shore line for some distance from the point where the dividing line of the uplands reaches the shore being straight, the whole shore of both parties and the whole of the port warden's line in front thereof need not be considered.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

2. Navigable Waters (§ 39*)—Littoral Rights—Rivers—Boundary Between Adjoining Owners.—In establishing the division line between the lands in a river between the shore line and the port warden's line or line of navigability, to which adjoining owners of shore lands are entitled, Code 1904, § 944a (31), providing that any person owning land on a water course may erect a wharf on it, provided navigation be not obstructed, nor the private rights of any other person be injured thereby, a line is not to be run at right angles from the port warden's line to the point where the two properties corner on the shore, but the shore line is to be treated as the base line.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

3. Navigable Waters (§ 39*)—Littoral Rights—Rivers—Boundaries Between Adjoining Owners—Shore Line.—So far as the shore line of a river enters into the determination of the dividing line of owners of adjoining lands thereon, as respects the lands between the shore line and the port warden's line, or line of navigability, it cannot be changed by one of them filling in in front of his uplands.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

Appeal from Circuit Court of City of Norfolk.

Suit by the Lambert's Point Company against the Norfolk & Western Railway Company. From the decree, complainant appeals, defendant assigning cross-errors. Reversed in part and remanded, and affirmed in part.

G. M. Dillard, for appellant.

Ro. M. Hughes and *W. L. Williams*, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

BUCHANAN, J. The appellant, Lambert's Point Company, and the appellee, Norfolk & Western Railway Company, are adjoining landowners on the shore of Elizabeth river. This suit was brought by the appellant to have "the extent of its enjoyment of the flats and land under the water and of the line of navigability of the said water in front of its land, at Lambert's Point," determined and set apart, and the division line over said flats between the properties of the appellant and the appellee defined and established.

With the action of the court in fixing the rights of the parties and establishing the division line between their properties neither party is satisfied. One has appealed, and the other has assigned cross-errors. In the view we take of the case, the errors and cross-errors assigned may be considered together.

In making the apportionment sought, and in determining and establishing the division line between the properties, the court was governed by the principles laid down in the case of *Groner v. Foster*, 94 Va. 650, 27 S. E. 493, which was also a controversy between riparian owners on the shore of Elizabeth river.

In this case, that portion of the shore line of both parties at Lambert's Point, taken into consideration in making the apportionment and in establishing the boundary line between the two properties, was irregular and curved, though not so much so as in *Groner v. Foster*. The port warden's line, or line of navigability, in front of said portion of the properties of the parties, was longer than, and not parallel with, the shore line. There is nothing in the facts of this case to take it out of the general rule laid down in *Groner v. Foster*.

[1] The court did not, in making the apportionment in this case, take into consideration the whole shore line of both parties and the whole of the port warden's line in front of them, and its failure to do so is assigned as error by the appellant.

It appears that the shore line on the northern portion of the appellant's land, and the shore line on the southern portion of the appellee's land, are almost continuing straight lines, and as to them there is practically no dispute as to the rights of the parties. This being so, we do not see that there was any necessity for taking into consideration the shore lines of the entire front of both properties, which were nearly two miles in length, in order to ascertain the rights of the parties, where the shore lines were curved and irregular, and to determine and establish the division line between their properties, which latter object seems to have been the principal object of the suit.

[2] The appellee insists that the court, in establishing the division line between the parties, erred in not running that line at right angles from the port warden's line to the point where the two properties corner on low-water mark.

Section 944a, subsec. 31, of Pollard's Code, provides that any person owning land upon a water course may erect a wharf on the same, or pier, or bulkhead, provided navigation be not obstructed, nor the private rights of any other person injured thereby. Such owner is, therefore, entitled in the apportionment of the water front to have his portion thereof laid off as nearly in front of his land as is practicable. *Groner v. Foster*, supra, 94 Va. 652, 27 S. E. 493. Where the shore line and the port warden's line are parallel, it would make no difference which of them was treated as the base line; but where they are not parallel, then the proper rule, in waters like Elizabeth river, having no defined stream running in a confined and continuous bed, is to treat the shore line as the base line, and extend the lines of the port warden's line as nearly as practicable in the front of the land of the riparian owner. The port warden's line establishes the line of navigability, and shows how far into the water course the riparian owner may improve his property; but that line can ordinarily have no effect in the determination of the boundaries of the riparian owners as between themselves. They derive their rights from grants from the commonwealth and the statutes of the state. The port warden's line has no effect upon their property rights beyond fixing the line of navigability, which they must respect in improving their water fronts. *Bay City, etc., Co. v. Industrial Co.*, 28 Mich. 182, 184; 3 Farnham on Waters, § 841, p. 2479.

"Very much of the confusion," it was said in *Bay City, etc., Co. v. Industrial Co.*, supra, "which is supposed to exist on this subject, has arisen from confounding things quite dissimilar. The controversies arising concerning riparian rights upon waters having no middle thread, properly so called, can have no bearing on rivers. Whether the proprietary right is confined by high or low water mark, or extends further, it is manifest that upon the open sea, or on a bay or other body of water having no defined stream running in a confined and continuous bed, the shore may be the only tangible element of computation or measurement, and it has very properly in such cases been regarded as the most important. But even there some regard has usually been paid to the common-sense rules which would prevent inequalities from being created by any blind adhesion to the accidental conformation of the shore line at the extremity of any riparian property; and regard is paid to extent, as well as to other considerations."

In *Blodgett v. Davis*, 87 Mich. 498, 507, 49 N. W. 917, 919 (24 Am. St. Rep. 175), it was said: "We cannot deal with Green Bay as we could with the rivers in the state, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundary of owners of land bor-

dering upon the ocean and great inland seas are more proper for the disposition of the case before us."

[3] The manner in which the commissioner, whose action in this respect was approved by the trial court, ascertained the shore line of the appellant's property, is assigned as error.

It appears that in front of a portion of its land at Lambert's Point the appellee has filled in and built wharves, etc., out to the port warden's line. The appellee insisted that its shore line should be ascertained by taking into consideration the shore line filled in by it, instead, as was done by the commissioner, of ascertaining the shore line as if the filling in had not been done. The action of the commissioner was clearly right, and his reasons therefore conclusive of the question. The contention of the appellee, he says, would have given the "railway company as a basis of apportionment a much greater extent of shore line than I deem it is entitled to. The railway company undoubtedly has a right to fill in this area, and the filled-in portion belongs to it; but I do not think that by making this improvement which it had a right to make, and which the land company could not prevent its making, it can thereby enlarge its riparian rights and advance the division line (which has always in contemplation of law existed, but has not been judicially ascertained) between its riparian rights and the riparian rights of the land company, the adjoining owner. If this contention were sound, it would lie in the power of one riparian owner, by its own voluntary act, which could not be prevented by the adjoining owner, to increase its riparian rights, and encroach upon the riparian rights of the other adjoining owner to any extent. * * *".

The other assignments of error on either side are so connected with or dependent upon the questions which we have considered and disposed of, it will be unnecessary to consider them in detail, but will be sufficient to say that upon the whole case we see no error in the decrees appealed from, and that they must be affirmed.

Affirmed.

CARDWELL, J., absent.

On Motion to Modify Decree.

PER CURIAM. Upon the motion of the appellant to modify the decree entered in this cause at this term, and the objections of the appellee to any change being made in said decree unless the whole case is reopened and reheard, the court is of opinion that there is no reason why the cause should be reheard; but, not being satisfied that the lines from the points B and D, on the shore line, to the port warden's line, as shown upon map No. 1 of Surveyor Gwathmey, filed in the cause, were located in accordance with the views expressed in the written opinion filed with

the decree entered in this cause at a former day of the term, or that the division line, as established between the parties by the circuit court in its decree of January 23, 1911, is located in accordance with the views expressed in said written opinion, it is adjudged, ordered, and decreed that the decree entered at a former day of the term, affirming the decrees of the circuit court, be and the same is hereby set aside and annulled, in so far as it affirmed the decrees of the trial court in reference to the said lines from the said points B and D to the port warden's line, and the said division line between the parties, and that the cause be remanded to the circuit court, with directions to have the said lines, if not so located, run in accordance with the views expressed in said written opinion, the true division line between the parties established, and for such further proceedings as may be proper in the cause.

CITY GAS CO. OF NORFOLK *v.* POUDRE.

March 14, 1912.

[74 S. E. 158.]

1. False Imprisonment (§ 20*)—Actions—Pleadings—Issues.—A defendant, who pleads not guilty to a declaration alleging that he wrongfully arrested plaintiff, may introduce any evidence that he did not commit the trespass, though he failed to file his grounds of defense as required by order of court, since Code 1904, § 3249, providing that, if a party fail to comply with an order requiring the filing of grounds of defense, the court may exclude evidence of any matter not described in the pleading of the party, does not deprive a defendant of the right to support a plea of not guilty by evidence as to any matter, the character of which is pointed out by the plea, such as the denial of the wrongful act charged.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-97; Dec. Dig. § 20.*]

2. Pleading (§ 370*)—Grounds of Defense—Filing—Order of Court.—The object of Code 1904, § 3249, providing that, if a party fails to comply with an order requiring the filing of grounds of defense, the court may exclude evidence of any matter not described in his pleading, is to give plaintiff reasonable notice of the particular defense on which defendant expects to rely, so that he may not be prejudiced by surprise.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1210; Dec. Dig. § 370.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.